Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
GTE Telephone Operating Cos.	)	CC Docket No. 98-79
GTOC Tariff No. 1	)	
GTOC Transmittal No. 1148	)	

AMERITECH OPPOSITION TO PETITIONS FOR RECONSIDERATION

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I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) respectfully submit this Opposition to Petitions for Reconsideration, filed by MCI WorldCom and the National Association of Regulatory Utility Commissioners (NARUC), of the Commission's Memorandum Opinion and Order in the above-captioned proceeding.[1] In that Order, the Commission held that an access offering by GTE, "which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level."[2]

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1 *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order,* CC Docket No. 98-79, FCC 98-292, released Oct. 30, 1998 (*Order*).

2 *Id.* at para. 1. The Commission reached the same conclusion with respect to Internet access offerings by Bell Atlantic, BellSouth, GTE System Telephone Companies, and Pacific Bell in a subsequent decision, which incorporated the reasoning of the *Order*. *See Bell Atlantic Telephone Cos., Bell Atlantic Tariff No. 1 Bell Atlantic Transmittal No. 1076, BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476, GTE System Telephone Co., GSTC FCC Tariff No. 1, GSTC Transmittal No. 260, Pacific Bell Telephone Co., Pacific Bell Tariff No. 128, Pacific Bell Transmittal No. 1986, CC Docket Nos. 98-168, 98-161, 98-167, and 98-103, FCC 98-317, released November 30, 1998.*

This decision was correct. Indeed, it was based on precedent that has been settled for over fifty years, pursuant to which the boundaries of a communication are defined on an end-to-end basis, without regard to intermediate switching points. As the Commission stated, "the Commission *traditionally* has determined the jurisdictional nature of communications by the end points of the communication and *consistently* has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[3]

The reason the Commission has *consistently* rejected attempts to divide communications at intermediate points of switching or exchanges between carriers is quite simple: it is the only way to protect the exclusive right of the federal government – and, more specifically, this Commission – to regulate interstate or foreign communications. If an end-to-end communication were subject to bifurcated jurisdiction, states would effectively have veto power over any federal regulation of that communication. In this respect, the end-to-end principle applied in the *Order* goes to the very core of federalism.

MCI WorldCom and NARUC nevertheless seek reconsideration of this decision. MCI WorldCom claims that, because ISPs are information service providers, not telecommunications service providers, any telecommunications transmitted by an end user onto the Internet terminates at the ISP switch. It also asks the Commission to reconsider its "blanket conclusion that more than ten

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[3] *Order*. at para. 17 (emphasis added).

percent of Internet traffic is destined for websites in other states or other countries."[4]

NARUC echoes MCI's jurisdictional claim, terming the application of end-to-end principles to Internet traffic as "inappropriate, or at least premature."[5] Instead of seeking a reversal of the *Order*, however, NARUC asks "that the FCC either disclaim the rationale proposed for allowing the tariff to go into effect or, at a minimum, clarify that the rationale presented is tentative, subject to further proceedings at the FCC, and in any case, is strictly limited to this docket, and does not act in any way to foreclose or channel the determinations currently pending before the Separations Joint Board."[6] NARUC also asks the Commission to clarify informal, off-the-record assurances that NARUC claims to have received from FCC representatives at NARUC's November Annual Convention in Orlando, Florida regarding dual tariffing. Specifically, it asks the Commission to formalize these alleged off-the-record assurances by clarifying that states may require intrastate tariffs of xDSL services designed to connect end-users to ISPs.

As discussed below, none of these claims has any merit whatsoever. The petitions of MCI WorldCom and NARUC should both be rejected.

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4 MCI Petition at 9.

5 NARUC Petition at 8.

6 *Id.*

II. ARGUMENT

A. Internet-Bound Telecommunications do not Terminate at the ISP's Local Server.

MCI WorldCom argues that the Commission's holding that ISP traffic terminates on the Internet, not at the ISP's local server, is inconsistent with its determination in the *Universal Service Report* that ISPs are information service providers, not telecommunications service providers.[7] MCI WorldCom concedes that ISPs use telecommunications services as inputs for their information services. It claims, nevertheless, that "[b]ecause ISPs do not provide telecommunications to their subscribers, there cannot be end-to-end telecommunications between the end user and the distant website."[8]

This argument is specious. For one thing, it is contrary to the *Universal Service Report,* which is the very precedent upon which it purports to be based. In the *Universal Service Report*, the Commission held that its classification of ISPs as information service providers, as opposed to telecommunication service providers, has no bearing on whether a competitive local exchange carrier that serves an ISP can be said to "terminate" Internet traffic.[9] The Commission thus rejected the very argument MCI WorldCom now makes.

More fundamentally, the Commission was correct to do so. The difference between an information service provider and a telecommunications service

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7 *Id.* at 3-5.

8 *Id.* at 4.

9 *Federal-State Joint Board on Universal Service, Report to Congress,* CC Docket No. 96-45, FCC 98-67, released April 10, 1998, n. 220 (*Universal Service Report).*.

provider is that, while a telecommunications service provider offers pure transmission service, an information service provider offers something more than pure transmission. Specifically, an information service provider combines telecommunications with enhancements, such as data processing and other functions. As stated by the Commission in the *Universal Service Report,* ISPs

> lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others. In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.[10]

Because information service providers, like ISPs, conjoin data transport with an enhancement, such as data processing, every information service is built on an underlying telecommunications component. The ISP may purchase that telecommunications component from a third party or it may use its own facilities to provide that component. Either way, one thing is always true: ISPs must arrange for the telecommunications services needed to connect their subscribers to the Internet destinations with which those subscribers communicate.[11]

MCI WorldCom suggests that, because ISP do not themselves provide these telecommunications services to its subscribers, those subscribers' telecommunications necessarily terminate at the ISP's local server. It makes no

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[10] *Id.* at para. 81.

[11] WorldCom has previously conceded as much, noting in its Comments in the *Universal Service* proceeding that "when UUNET purchases network capacity, a basic telecommunications service, from WorldCom Technologies, Inc., WorldCom reports those revenues to the USAC as revenues earned from an end user." *See id.* at n. 134.

difference, however, whether the ISP or some other entity – namely the telecommunications carrier chosen by the ISP for the transmission component of its information service – carries telecommunications from the ISP to their ultimate Internet destination. What matters is that the telecommunications is, in fact, transmitted elsewhere. If it is, as is Internet traffic, then that traffic does not terminate at the ISP's local server. Rather, that server simply represents an intermediate switching point through which communications between subscribers and the Internet must pass.

Of course, none of this is new. While the Commission has not previously addressed the termination point of Internet traffic *per se,* the Commission has repeatedly recognized in a variety of contexts that the boundaries of a communication – any communication - are determined on an end-to-end basis.

In fact, the Commission previously had applied this decades-old principle to the telecommunications component of an information service. Specifically, in the *BellSouth MemoryCall Order*, the Commission held that when an out-of-state caller accesses a voice mail service, there occurs a single interstate communication, which begins with the caller and terminates at the ultimate destination of the information service – the voice mail equipment. In so holding, the Commission recognized that telecommunications does not terminate where an information service begins: to the contrary, it found there to be a single communication the boundaries of which begin with the telecommunications service used to connect to the information service and end with the termination point of the information service – the voice mail box. The Commission properly

cited this precedent in concluding that GTE's DSL service does not terminate at the ISP switch.

MCI WorldCom, however, claims that the *BellSouth MemoryCall Order* is inapposite.[12] Indeed, it goes so far as to suggest that the *MemoryCall Order* actually supports its claim that ISP traffic terminates at the ISP POP. These arguments are specious.

In arguing that the *MemoryCall Order* is not on point, MCI WorldCom contends that this decision addresses an end-to-end telecommunications service, not a combined telecommunications service and information service. That is incorrect. When BellSouth forwards an uncompleted call to a voice mail apparatus it *uses* telecommunications in the same way that ISPs use telecommunications services to connect their customers to remote web sites. It may even be deemed a provider of telecommunications services, *albeit* to itself,

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[12] NARUC, as well, questions the relevance of the *BellSouth MemoryCall Order*. According to NARUC, that order involved a case where end-to-end communications terminated on the public switched network, whereas Internet communications do not. NARUC Petition at 8. This distinction, however, has no legal relevance. The FCC has jurisdiction under the Communications Act over "all interstate and foreign communication by wire," not just communications that originate and terminate on the public switched network. *See* 47 U.S.C. § 152(a). For this reason, an "end-to-end" analysis must be, and has been, applied, not only to communications that originate and terminate on the public switched network, but to communications that terminate off the public switched network or that never traverse that network at all. Indeed, in one of the earliest "end-to-end" cases, a federal court expressly rejected an argument that the FCC's jurisdiction over interstate wire communications ends at the switchboard of a PBX – *i.e.,* when the communication leaves the public switched network. The court held "the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion." *United States v. AT&T,* 57 F. Supp. 451, 453-455 (S.D. N.Y. 1944), *aff'd*, 325 U.S. 837 (1945). *See also Southern Pacific Communications Company Tariff FCC No. 4,* 61 FCC 2d 144, 146 (1976), wherein the Commission stated: "As we have often recognized, this Commission's jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination." *And see General Telephone Co. of California v. FCC,* 413 F.2d 390, 397 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)(applying end-to-end principles to cable facilities furnished by telephone companies and holding that such facilities "are links in the continuous transmission of the signals from the point of origin to the set of the viewer[.]")

just as MCI WorldCom provides telecommunications when it carries Internet backbone traffic on behalf of its own or other ISPs. The service BellSouth provides to customers, however, when it forwards their unanswered calls to a voice mailbox is not a telecommunications service; it is an information service, just like the service an ISP provides to its customers when it connects them to remote web sites.[13] Thus, as with GTE's xDSL service, the *MemoryCall Order* applies end-to-end jurisdictional principles to telecommunications that begin with a telecommunications service and end as the telecommunications component of an information service. It is not merely relevant; it is directly on point.

Equally specious is MCI WorldCom's claim that the *MemoryCall Order* actually supports MCI WorldCom's contention that ISP traffic terminates at the ISP POP. According to MCI WorldCom, the *BellSouth MemoryCall Order* makes clear that an enhanced service provider's "facilities and apparatus" constitute the relevant end point of a communication. It posits that, since an ISP's "facilities

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[13] The fact that BellSouth was the common carrier providing the underlying telecommunication service used for its information service does not alter the fact that BellSouth's voice mail service is an information service, not a telecommunications service. This is clear from countless Commission decisions, the most recent of which is the *Universal Service Report*, wherein the Commission noted that the classification of a service as a basic service or an information service depends "on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." *Universal Service Report* at para. 59. Indeed, the Commission recognized in the *Universal Service Report* that some ISPs own transmission facilities and engage in data transport over those facilities to provide their Internet service. While the Commission correctly noted that these ISPs effectively provide telecommunications services to themselves and might thereby be obligated to contribute to the Universal Service Fund, the Commission emphasized that the service these ISPs provide to subscribers remains an information service, not a telecommunications service. *Id.* at note 138.

and apparatus" are at the ISP point of presence (POP), that POP should be deemed the end point of Internet communications.[14]

This argument misrepresents both the text and the reasoning of the *BellSouth MemoryCall Order.* As to the text, the Commission held that its jurisdiction continues to the "instrumentalities, facilities, apparatus and *services* that comprise BellSouth's voice mail service.[15] MCI conveniently omits this reference to "services" for obvious reasons: the services offered by an ISP include access to Internet web sites, e-mail, etc.

MCI WorldCom also twists beyond recognition the reasoning underlying the *MemoryCall Order.* In concluding that BellSouth's voice mail service terminates at the voice mail apparatus, the Commission in no way suggested that the location of that equipment was, in and of itself, relevant to its jurisdictional analysis. Indeed, the Commission expressly rejected that notion, holding that its decision was based on the "transmission's ultimate destination" rather than "the physical location of the technology."[16] The ultimate destination of Internet traffic is the Internet. Under the analysis of the *MemoryCall Order,* that traffic terminates on the Internet, not, as MCI claims, at the ISP POP.

While MCI's attempt to distinguish or rewrite the *MemoryCall Order* is, therefore, meritless, it is also largely pointless, since that order is not the only context in which the Commission has made clear that telecommunications does

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14 MCI WorldCom Petition at 6-7.

15 *BellSouth MemoryCall Order* at para. 11 (emphasis added).

16 *Id.* at para. 11.

not end where an information service begins. Rather, this has been made clear in a series of orders spanning fifteen years.

Since the adoption of the Part 69 access charge regime in 1983, the Commission has consistently recognized that local exchange carriers provide *access service* when they deliver traffic from an end user to an information service provider (then referred to as "enhanced service provider" or ESP).[17] Access service is, by definition, "services and facilities provided for the origination and termination of any interstate or foreign telecommunication."[18] Thus, in recognizing that telecommunications sent to an ESP is access traffic, the Commission has necessarily recognized that this telecommunications does not terminate at the enhanced service provider's switch or POP, but is, rather, part of an interstate or foreign communication.

B. The Commission Properly Applied the Ten Percent Rule in Concluding That GTE's DSL Service is Interstate.

MCI WorldCom also asks the Commission to reconsider its "blanket conclusion that more than ten percent of Internet traffic is destined for websites in other states or other countries." MCI WorldCom claims that "[e]ven if more than ten percent of some end users' Internet traffic is destined for websites in other

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[17] *See, e.g., MTS and WATS Market Structure,* 97 FCC 2d 682, 711 (1983) ("[A]mong the variety of users of access service are ... enhanced service providers[.]") *See also Order* at para. 21 ("That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary.") *And see National Association of Regulatory Utility Commissioners v. FCC,* 737 F.2d 1095, 1136 (D.C. Cir. 1984) ("[t]he access charges paid by ...ESPs may thus not fully reflect their relative use of exchange access.") For a more detailed discussion, *see* Ameritech Comments on GTE Direct Case, Sept. 18, 1998, at 9-14.

[18] 47 CFR § 69.2(b).

states or countries, the record in this proceeding does not support a conclusion that this is the case for all end users."[19]

This argument misconceives the ten percent rule. The ten percent rule was adopted pursuant to the recommendation of the Joint Board to prevent customers from avoiding state tariff regulation through the addition of *de minimis* amounts of interstate traffic to private line systems carrying primarily intrastate communications.[20] In adopting the ten-percent rule, the Commission made clear that the rule should be implemented in a way that minimizes the associated administrative burdens. For example, it disavowed any intent to require traffic studies, indicating that users could rely on system design and function in assessing whether the ten percent test was met:

> As the Joint Board recognized, traffic on many special access lines cannot be measured at present without significant additional administrative efforts. In many cases, even the end user does not have precise information on traffic patterns, although such customers should have sufficient information on relative state and interstate traffic volumes, for purposes of this rule, *based on system design and functions*. ...[W]e do not expect special access customers to perform additional traffic studies for this purpose. To mandate a more rigorous approach would seriously undermine the administrative benefits of the separations procedures recommended by the Joint Board.[21]

MCI WorldCom nevertheless suggests that the ten percent rule should be separately applied to each individual Internet user. This suggestion might

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19 MCI WorldCom Petition at 9-10.

20 Prior to the adoption of the ten percent rule, all mixed use special access traffic was assigned to the interstate jurisdiction.

21 *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (released July 20, 1989) at para. 6, n. 7 (emphasis added).

warrant passing consideration if a credible argument could be made that large numbers of Internet users limit themselves almost entirely to intrastate web sites. That argument, however, is on its face implausible. The Internet is a "global web of linked networks and computers[,]" a "decentralized, global medium of communications – or 'cyberspace' – that links people, institutions, corporations, and governments around the world."[22] As GTE showed in its Direct Case, even a cursory investigation reveals that the overwhelming majority of Internet traffic is interstate.[23] Under the circumstances, a subscriber-by-subscriber assessment would be wholly superfluous.[24] The Commission was right to presume, based on system design and function, that more than ten percent of all users' Internet traffic is destined for web sites in other states or countries.[25]

C. The Commission's Order Precludes Intrastate Tariffing of xDSL Services Designed to Connect Users to ISPs.

NARUC asks the Commission to clarify that the Order does not preclude states from requiring intrastate tariffing of xDSL services that connect users to ISPs. The Commission should reject this request.

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22 Barbara Esbin, Associate Bureau Chief, Cable Services Bureau, *Internet Over Cable: Defining the Future in Terms of the Past,* FCC Office of Plans and Policy Working Paper No. 30, Aug. 1998, at 6, *citing ACLU v. Reno,* 929 F. Supp. 824, 830-849 (E.D. Pa. 1996), *aff'd,* 117 S. Ct. 2329 (1997).

23 *See* GTE Direct Case, Exhibit B; *Internet Geography, <http://www.internet.org>.*

24 Although GTE stated that it expected to ask every customer to certify that ten percent or more of its traffic is interstate, GTE Rebuttal at 15, Ameritech believes that such a process would be superfluous and that the Commission may properly presume, based on the nature of the Internet, that at least ten percent of Internet traffic is interstate.

25 The Commission acknowledged that, to the extent DSL service is used for predominantly intrastate purposes – for example, a work-at-home application that enables a subscriber to connect to a corporate LAN - it should be tariffed at the state level.

As an initial matter, this would not be a "clarification," but a reversal. Nowhere in the *Order* did the Commission suggest that states could require local exchange carriers to file xDSL tariffs for Internet access service. To the contrary, the Commission suggested that state tariffs would be appropriate "[s]hould GTE or any other incumbent LEC offer an xDSL service that is intrastate in nature, for example a "work-at-home" application where a subscriber could connect to a corporate local area network[.]"[26] Indeed, the whole point of the ten percent test applied by the Commission is to assign *exclusive* jurisdiction over mixed use special access traffic to either the interstate or intrastate jurisdiction.[27] That is why the Commission found it unnecessary to consider preemption issues that had been raised by various parties: having concluded that the FCC has exclusive jurisdiction over this traffic under the ten percent test, there could be no state regulation to preempt.

Second, the Commission's assertion of exclusive jurisdiction pursuant to the ten percent test was not a matter of discretion: it was an application of a Commission rule - a rule that reflects the recommendation of a Joint Board.[28] In adopting this rule, both the Commission and the Joint Board considered alternative proposals pursuant to which the FCC and the states would share jurisdiction over mixed use special access traffic. The Joint Board recommended against such proposals, and the Commission agreed. NARUC has presented no

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26 *Order* at para. 27.

27 ***MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board***, 4 FCC Rcd 5660 (1989) at paras. 4, 7.

28 *Id.*

ground that would permit the Commission to ignore its own rules governing jurisdiction over mixed use special access traffic.

NARUC's request is also inconsistent with countless decisions in which the Commission, the states, and the Joint Board have taken steps to prevent tariff shopping. Indeed, one of the Joint Board's stated purposes in recommending the ten percent rule which the Commission applied in the *Order* was to prevent the very type of tariff shopping that NARUC's request would engender.[29]

The Commission's Open Network Architecture (ONA) decisions are not to the contrary; those decisions did not permit state and federal tariffs for identical uses of identical services. In its ONA orders, the Commission required federal tariffing of all ONA services (*i.e.,* basic service elements or BSEs) that were technically compatible with interstate access arrangements. The FCC made clear, however, that "ESPs are not permitted to use interstate BSEs in the provision of intrastate services[.]"[30] Rather, as explained by the United States Court of Appeals for the Ninth Circuit, the Commission merely set rates for all BSEs that potentially could be used for interstate service, without purporting to apply those rates to anything other than actual interstate use.[31]

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29 *See MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* 4 FCC Rcd 1352 (1989) at para. 23 ("Our concern with achieving a proper balance between federal and state interests also leads us to conclude that the opportunities for 'tariff shopping' inherent in the current procedures should be reduced.") *See also id.* at paras. 28, 30-32.

30 *Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 1* 7 FCC Rcd 1512 (1992) at para. 73.

31 *See California v. FCC,* 4 F.3d 1505, 1515 (9th Cir. 1993).

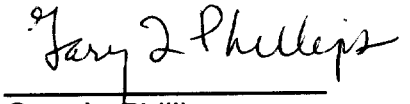
In the ONA context, it was possible to distinguish between intrastate and interstate use. Thus dual tariffing was appropriate, just as it is appropriate for any service that can be used on a purely interstate or intrastate basis. Internet traffic, however, is jurisdictionally inseverable. Wholly apart from the ten percent rule, which classifies xDSL traffic as exclusively interstate, dual tariffing would only create inappropriate opportunities for tariff shopping.

Finally, NARUC's request is contrary to section 706 of the 1996 Act. Section 706 directs the Commission to determine whether advanced telecommunications capability is being deployed to all Americans and, if not, to take immediate action to accelerate deployment of such capability by removing barriers to investment and promoting competition. If states are permitted to share jurisdiction over the rates, terms, and conditions under which local exchange carriers provide Internet access, any FCC policy can be negated by state action. This is not merely a theoretical concern. In its section 706 NPRM, the Commission has proposed to treat incumbent LEC data affiliates as nondominant carriers if those affiliates comply with certain structural separation requirements. If states are nevertheless permitted to require those same affiliates to tariff xDSL and other Internet access services, an important component of the Commission's section 706 policy will be nullified. On a broader level, state regulation of Internet access services could lead to a patchwork quilt of inconsistent state policies that, collectively, undermine the federal interest in promoting deployment of advanced infrastructure.

III. CONCLUSION

For the reasons discussed above, the MCI WorldCom and NARUC petitions for reconsideration should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of Ameritech Opposition to Petitions for Reconsideration has been served on the parties attached via first-class mail - postage prepaid, on this 5th day of January 1999.

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